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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/018,451	03/07/2002	Ernst Bernhard Grabitz	205,360	4546

7590 09/23/2004

ABELMAN, FRAYNE & SCHWAB  
150 EAST 42ND STREET  
NEW YORK, NY 10017

EXAMINER

SRIVASTAVA, KAILASH C

ART UNIT	PAPER NUMBER
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1651

DATE MAILED: 09/23/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

10/018,451

Applicant(s)

GRABITZ, ERNST BERNHARD

Examiner

Dr. Kailash C. Srivastava

Art Unit

1651

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 05 November 2003.
- 2a) ☒ This action is FINAL. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 25-33 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 25-33 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

## Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

## Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_

### DETAILED ACTION

1. Applicants' amendment filed 11/05/2003 is acknowledged and entered. The text of those sections of Title 35 U.S. Code not included in this action can be found in a prior Office action.
2. Claims 25-33 are pending.

#### *Claim Rejections - 35 U.S.C. §§ 102(b) and 103(a)*

3. Newly presented Claims 25-33 that replace Claims 1-24 remain rejected under 35 U.S.C. § 102(b) as anticipated by Pannell (U.S. Patent 5,288,632) with evidence provided by Gruenwald et al (eds. PDR for Herbal Medicines. 1998. Medical Economics company, Montvale, N.J., Pgs. 836-839) and Sagar et al. (WO 94/22572) respectively.

Newly presented Claims 25-33 remain rejected as obvious under 35 U.S.C. § 103(a) over Pannell (U.S. Patent 5,288,632) with evidence provided by Gruenwald et al., in view of Sagar et al. (WO 94/22572) for reasons set forth in the Office Action mailed 08/08/2003 and additional reasons discussed below.

In response to the rejections cited *supra* applicants argue that the claimed invention is non-anticipatory and unobvious over the cited reference, because the cited reference do not disclose or suggest, or provide motivation to arrive at the presently claimed invention because the instantly claimed invention is claimed as a product-by-process invention, wherein, microorganisms are first emptied of their intracellular components with a hypertonic solution and thus emptied microorganisms are subsequently filled with a the "pharmaceutically active substances according to the method of the invention" (Arguments Page 5, Line 10-17). This argument is not deemed to be persuasive because although the claimed invention is drawn to a product by process, the net end product is a microorganism that is loaded with a pharmaceutical

product under hypo/isotonic conditions and is therefore anticipated by and obvious over the cited references,

In response to applicants' arguments against the references individually, one cannot show non-obviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

Applicants arguments are fully considered, however, these are not persuasive for the reasons recited *supra*.

### CONCLUSION

4. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, THIS ACTION IS MADE FINAL. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).


A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

5. No Claims are allowed.

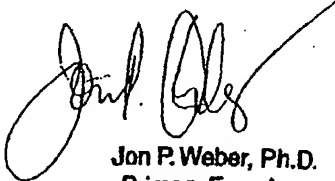
6. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Examiner Kailash C. Srivastava whose telephone number is (571) 272-0923. The examiner can normally be reached on Monday to Thursday from 7:30 A.M. to 6:00 P.M. (Eastern Standard or Daylight Savings Time).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael Wityshyn, can be reached on (571) 272-0926 Monday through Thursday. The fax phone number for the organization where this application or proceeding is assigned is (703)-872-9306.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0196.

 Kailash C. Srivastava, Ph.D.  
Patent Examiner  
Art Unit 1651  
(571) 272-0923

February 5, 2004

  
Jon P. Weber, Ph.D.  
Primary Examiner